IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Tunoi & Lakha JJ A)

CIVIL APPEAL (APPLICATION) NO 8 OF 2002

REPUBLIC…….. APPLICANT

VERSUS

ATTORNEY GENERAL & ANOTHER…..……. RESPONDENT

EX PARTE: KENYA AIRLINE PILOTS ASSOCIATIONS

(Appeal from the Ruling and Order of the High Court of Kenya

at Nairobi, Visram J dated 7th August, 2001 in High Court

Miscellaneous Civil Application No 254 of 2001)

JUDGMENT

By its notice of motion dated and lodged in this Court on 6th February, 2002 and expressed to have been brought under rules 42(1) and 80 of the Court's Rules "the Rules", Kenya Airways Limited, the applicant herein, asks us to strike out the notice of appeal dated 10th August, 2001, and the record of appeal filed pursuant to that notice, i.e. Civil Appeal No 8 of 2002 lodged in the Court on 17th January, 2002 by Kenya Airline Pilots Association, to whom we shall hereinafter refer as the respondent.

The background information leading to the filing of the motion now before us is that the applicant and the respondent had some labour or industrial dispute and pursuant to the provisions of the Trade Disputes Act, Chapter 234 of the Laws of Kenya, the dispute between the two protagonists was referred to the Industrial Court for resolution. The Industrial Court having heard the matter, made an award. It appears that the parties were not in agreement as to what the award meant and the award was subsequently referred back to the Industrial Court for interpretation. The Industrial Court duly interpreted its award and the applicant was not happy with that interpretation. The applicant in fact alleged that the Industrial Court had exceeded its jurisdiction when it purported to interpret its earlier award.

There is, however, no right of appeal to the High Court from the decisions of the Industrial Court.

Indeed section 17 of Cap 234 specifically provides thus:

"17(1) The award or decision of the Industrial Court shall be final.

(2) The award, decision or proceedings of the Industrial Court shall not be questioned or reviewed and shall not be restrained or removed by prohibition, injunction, *certiorari* or otherwise, either at the instance of the Government or otherwise.

In spite of these provisions the applicant moved to the High Court under judicial review provisions of order 53 of the Civil Procedure Rules, and it appears that the applicant sought leave from the High Court, to apply for an order of *certiorari* to bring into the High Court for the purpose of its being quashed the decision of the Industrial Court purporting to interpret its award. The application for leave came for hearing *ex parte* before Mr Justice Osiemo and that learned judge granted leave to the applicant on 23rd March, 2001. Pursuant to that leave the applicant filed its notice of motion on 29th March, 2002 and the only prayer made in that motion was that:

"... an order of *Certiorari* do issue to remove into this Honourable Court and quash all orders contained in the decision entitled 'Interpretation of Award' delivered by the Industrial Court (Mr Justice Chemmuttut, Mr SM Maithya and Mr AK Kerich) on 26th February, 2001 in Industrial Court Cause No 94 of 1993 (Kenya Airline Pilots Association vs Kenya Airways Limited)."

This motion was served on the respondent and on the Industrial Court itself. The motion was supported by an affidavit sworn by one Lewis Gacuca Kamau who described himself as General Counsel and Company Secretary to the applicant.

Before the applicant's motion seeking the order of *certiorari* could be heard, the respondent, in turn, moved the High Court, by way of a notice of motion under sections 3A, 26 and 80 of the Civil Procedure Act, and under orders VII rule 6 and XLIV rule 1 of the Civil Procedure Rules and among the prayers sought in that motion were:

"(1) That this Honourable Court be pleased to set aside vacate and/or review its order given *ex parte* on 23rd

March, 2001 giving the applicant leave to apply for an order of *certiorari* and staying proceedings in Industrial

Court Cause No 94 of 1993; and (2) That this Honourable Court be pleased to strike out the notice of motion dated 29th March, 2001 applying for an order of *certiorari*".

The respondent's notice of motion was heard by Mr Justice Visram over several days and in a reserved ruling dated and delivered on 7th August, 2001, he dismissed the motion with costs. It is that dismissal which led to Civil Appeal, No 4 of 2002 being lodged in this Court on 17th January, 2002 and as we have already stated the appeal was lodged pursuant to the notice of appeal lodged by the respondent on 10th August, 2002. We only need to add that after leave to apply for the order of *certiorari* was granted to the applicant, the proceedings in the High Court were headed thus:

REPUBLIC OF KENYA:

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO 254 OF 2001

REPUBLIC

VERSUS

THE INDUSTRIAL COURT

EX-PARTE

KENYA AIRWAYS LTD ..... APPLICANT

AND

KENYA AIRLINE PILOTS ASSOCIATION

INTERESTED PARTY

No mention is made of the Hon The Attorney General as being in anyway involved in the dispute. Even the notice of appeal lodged by the respondent on 10th August, 2002 maintained this format, but besides showing that it was to be served on M/s Inamdar & Inamdar Advocates who have always acted for the applicant, the notice also showed that it was to be served on the Attorney General. It was not specified on the notice itself why it was to be served on the Attorney General, though service on the Industrial Court was not also mentioned. It is also admitted that up to the stage when the notice of appeal was lodged the Attorney General had not participated in the proceedings either as a party or as an advocate for anyone. It was agreed before us that while the notice of appeal was duly served on the Attorney General, it was not served on the Industrial Court.

When the appeal itself was lodged the format had changed. The Republic still remained the appellant while the Attorney General was listed as the respondent. The applicant, Kenya Airways Ltd became an interested party while the respondent Kenya Airline Pilots Association is shown as the party at whose instance the proceedings before Visram J had been brought.

The Industrial Court is not mentioned at all in the appeal. In these circumstances, it is not surprising that the applicants first ground for striking out the notice of appeal and the appeal itself is that the notice of appeal was not, contrary to rule 76 of the Rules, served upon the Industrial Court, "a person directly affected by the appeal". Mr Inamdar argued before us that the respondent was bound to serve the Industrial Court. It had been served with the motion applying for an order of *certiorari*. Though the Industrial court chose to do nothing it was a party to the proceedings in the High Court and as such the respondent were under a duty either to serve it with the notice of appeal or to seek dispensation of such service from the Court. The respondent did neither and on the numerous authorities of this Court, the respondent's notice of appeal ought to be struck out. Service upon the Attorney General who was not a party to the proceedings in the High Court and who was not shown to have been acting for the respondent was not service upon the Industrial Court.

What was Mr Adere's answer to these contentions by Mr Inamdar?

Basing himself upon the provisions of sections 12 and 13 of the

Government Proceedings Act, Chapter 40 of the Laws of Kenya, Mr Adere in effect submitted that the proceedings against the Industrial Court which is a government institution were proceedings against the Government itself and under section 12(1) of Cap 40 the proceedings against the Industrial Court were instituted against the Government and, therefore, were in effect, instituted against the Attorney General. We do not think Mr Adere's contention can be maintained in view of this Court's decision in the case of *The Commissioner of Lands v Kunste Hotel Ltd* Civil Appeal No 234 of 1995 (unreported). There Kunste Hotel Ltd. had applied for an order of *certiorari* to bring into the High Court and quash, a certain decision made by the Commissioner of Lands. It was argued that the action was against the Government and as notice to institute it had not been given as required by section 13A of the Government Proceedings Act, amongst others, the action was not maintainable. Rejecting that contention the Court had this to say:

"By virtue of the provisions of s 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 of the United Kingdom, which is applicable in this country by reason of s 8(2) of the Law Reform Act, prerogative writs were changed to be known as 'Order' except for the writ of *habeas corpus*. So s 8 (1) above denies the

High Court the power to issue the orders of mandamus prohibition and certiorari while exercising Civil or

Criminal jurisdiction. What that then means is that notwithstanding the wording of s 13A, above, which talks of proceedings, in exercising the power to issue or not to issue an order of *certiorari* the Court is neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of s 136(1) of the Government Lands Act, and also s 13A of the Government Proceedings Act, which, had the matter under consideration been an action, would properly have been invoked to defeat the present matter...."

A short summary of this passage must be that judicial review proceedings are not subject to the provisions contained in the Government Proceedings Act. Mr Adere's reliance on sections 12 and 13 of that act, is, therefore, and with respect to him, misplaced and we reject his submissions to that effect.

But the truth of the matter is that the notice of appeal showed that it was to be served on the Attorney General. It did not say what capacity the Attorney General was to be served. The notice was in fact served on the Attorney General and we take it that it was properly served. On 30th August, 2001, the Attorney General filed a notice of address for service, and on 29th October, 2001 the Attorney General field a notice of appointment of an advocate showing that he had been appointed to act for the Industrial Court. The Industrial Court itself has never complained that it was not served with the notice of appeal; nor has it complained that the Attorney General is not its advocate.

In these circumstances, though Mr Adere wrongly joined the Attorney General as a party and though Mr Adere might have served the Attorney General with the notice of appeal for the wrong reason, the truth of the matter is that the Attorney General was served and he is in fact acting as the appointed advocate for the respondent. We accordingly refuse to strike out the notice of appeal and the appeal itself on the ground that the notice of appeal was not served on the Industrial Court. The notice was served on the advocate for the Industrial Court. Nor do we think that the appeal should be struck out on the ground that a wrong party has been joined as a respondent. That is a matter which is curable by an amendment. The position would have been different if the Attorney General had been named in the notice of appeal as a respondent.

In view of what we have said above, we do not think there is merit in ground two on which the motion is brought, namely that the appeal was filed out of time because a letter by the respondent applying for proceedings and ruling was not served on the Industrial Court. A copy of that letter was sent to the Attorney General and there was no evidence that it was not received in that office. The requirement in rule 81(2) of the rules is not that a copy of the letter applying for proceedings and ruling be "served" on the respondent; the requirement is only that the copy be "sent" to the respondent. We have also covered ground three where it is complained that the Attorney General has been wrongly joined as a party. That, in our view, is a curable irregularity.

That brings us to ground four which alleges that the respondent has failed to include in its record of appeal the whole of the affidavit (including the exhibits thereto) of Lewis Gacuca Kamau, sworn on 16th March, 2001 and filed in the Superior Court and which affidavit was read in that Court. Our understanding of the legal position is that only documents considered as being primary ones under rule 85 (1) must be included in the record of appeal and if they are not so included, the appeal would be incurably defective and can only be struck out. What are primary documents under rule 85(1)? They are documents other than those covered under rule 85(2A) of the Rules and that rule provides.

(85(2A): Where a document referred to in paragraph (a), (b), (e), (i) or (k) of sub-rule (1) is omitted from the record, the appellant may, with the leave of the Court, include the document in a supplementary record of appeal filed under rule 89(3)".

These are the documents which may, with the leave of the court, be included in the record of appeal through a supplementary record. Documents contained in paragraphs (c) [pleadings], (d) [trial judge's notes of the hearing], (f) [the affidavits read and all documents put in evidence at the hearing, or if such documents are in the English language, certified translations thereof], (g) [the judgment or order], (h) [a certified copy of the decree or order] and (j) [the notice of appeal] Mr Inamdar contended that the affidavit of Lewis Gacuca Kamau which was left out to the record of appeal fell under paragraph (f)

because that affidavit was read in the Superior Court. We must, of course, not forget the matter we are dealing with. We are dealing with the order of Visram J refusing to set aside the *ex parte* order granting leave and to strike out the notice of motion filed pursuant to the leave granted *ex parte*. We have set out elsewhere the respondent's notice of motion seeking to set aside the leave granted *ex parte.* If the leave granted *ex parte* were to be set aside, then it would follow as a matter of course that the applicant's notice of motion filed pursuant to the leave would be struck out. The respondents motion to set aside the grant of leave was supported by the affidavit of one Benny Kanyi Waweru. The applicant did not, it seems to us, file a replying affidavit to the respondent's motion and affidavit. So that for the purpose of deciding the issue of whether or not to set aside the grant of leave, the pleadings, i.e. the primary documents, were the respondent's notice of motion itself and the affidavit of Benny Kanyi Waweru in support of the motion. Had the applicant sworn a replying affidavit in opposition to the setting aside of the leave, such affidavit would have automatically become a pleading, i.e. a primary document, for the purpose of deciding the issue of whether or not to set aside the grant of leave.

The exhibits whose exclusion from the record the applicant is complaining about were annexed to the affidavit of Lewis Gacuca Kamau sworn on 16th March, 2001. That affidavit was filed in support of the applicant's motion applying for an order of *certiorari*. Mr Benny Kanyi Waweru's affidavit of 11th June, 2001, was not in reply to that of Kamau. So that even if Kamau's affidavit and the annextures thereto had been read before Visram J, they could not have been primary documents in the application to set aside the grant of leave. With the greatest respect to Mr Inamdar, the affidavit of Kamau dated 16th March, 2001 and the annextures thereto could only qualify as:

"such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant"

-rule 85(1)(K), when considering the issue of whether or not to set aside the grant of leave. Documents which fall under paragraph (k) of rule 85(1) can be put in by way of a supplementary record and the failure to include them does not render an appeal incurably defective.

We have said more than enough, we think, to show that we are not for allowing the applicant's notice of motion dated 6th February, 2002 which seeks the striking out of the notice of appeal and the record of appeal. We accordingly order that the said notice of motion be and is hereby dismissed.

On costs, we do not think that the respondent is entitled to the costs of the dismissed motion. It was the respondent who, without any basis in law, brought in the Attorney General as a party and we have rejected Mr Adere's submission in that respect. In the circumstances, the fair order to make as regards the costs of motion is and shall be that each party shall, bear its costs of the motion. These shall be our orders in the matter.

Dated and delivered at Nairobi this 21st day of March, 2003

R.S.C OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR